

SUPREME COURT OF THE UNITED STATES

HORACIO ALVARADO v. UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 89-6985. Decided June 25, 1990

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

I have previously expressed my doubt as to the wisdom of automatically vacating a Court of Appeals judgment favorable to the government when the Solicitor General confesses error in this Court. See *Mariscal v. United States*, 449 U. S. 405, 406 (1981) (REHNQUIST, J., dissenting). Today the Court carries this unfortunate practice to new lengths: the Solicitor General has not confessed error in this case, but instead has taken the position that the judgment of the Court of Appeals was correct and that certiorari should be denied.

The Solicitor General's brief in opposition contains the following statement:

"Although petitioner's *Batson* claim lacks merit, we agree with petitioner that the Court of Appeals' analysis departed from the general approach to discrimination and jury selection that this Court has marked out in *Batson*."

The Court seizes upon this concession that the "analysis" of the Court of Appeals may have been wrong as a justification for vacating the judgment. But the entire thrust of the Solicitor General's brief is that the result reached by the Court of Appeals was correct.

A confession of error is at least a deliberate decision on the part of the Solicitor General to concede that a Court of Appeals judgment in favor of the government was wrong. In the present case, however, we have only the above quoted

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statement of the Solicitor General in his brief opposing a grant of certiorari. If we are now to vacate judgments on the basis of what are essentially observations in the Solicitor General's brief about the "approach" of the Court of Appeals in a particular case, I fear we may find the Solicitor General's future briefs in opposition much less explicit and frank than they have been in the past. Since we depend heavily on the Solicitor General in deciding whether to grant certiorari in cases in which the government is a party, the Court will be the loser as a result.